The creeping scope of State aid in relation to energy taxes and charges

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On 9 April 2014 the European Commission (the "Commission") adopted new guidelines on State aid for environmental protection and energy (the "EEAG"). The EEAG came at a germane time, as they were adopted shortly after the Commission had opened investigations into the German Renewable Energy Act 2012 and the UK had submitted notifications on schemes to repair the malfunctioning Emission Trading Scheme ("ETS"), which had been designed to put a price on carbon.

The EEAG set out the conditions for approving State aid both for projects designed to protect the environment (by improving standards) and also for encouraging the production of electricity from Renewable Energy Sources ("RES"). While previous versions of the EEAG also covered RES, the novelty of the new EEAG is that it now provides a basis for approving State aid for a range of energy projects at the heart of energy policy, such as aid granted for capacity mechanisms, aid for Carbon Capture and Storage projects, aid granted in the context of the ETS, and aid for energy infrastructure.

While the EEAG are interesting from various perspectives, this article deals exclusively with State aid granted in the form of reductions from energy taxation and electricity charges. Energy tax and electricity charge reductions have been at the centre of several recent cases launched by the Commission and have been politically contentious. The draft version of the EEAG was equally contentious, but the final version was nevertheless finally adopted by the Commission in the Spring.

I. Introduction

The EEAG are situated at the coalface where EU energy taxation and policy, industrial policy and the EU State aid rules meet, and often collide. The EEAG are the outcome of an intense consultation process, which took place amid new Commission investigations into aid schemes on RES and related areas. It is one of many instruments designed to promote the generation of electricity from RES in order to achieve the EU's 2020 targets and 2030 and 2050 goals, while at the same time controlling electricity market distortions resulting from the State aid granted to RES.[1] Furthermore, the EEAG are designed to balance the granting of State aid with the EU priority of shifting to a low carbon economy by achieving a 20% reduction in greenhouse emissions compared to 1990 through decarbonisation.[2]

II. Energy taxes and charges under the State aid rules

(i) Energy taxes

Several "green" Member States, e.g. Norway, Sweden and Denmark, have a policy of high environmental protection. Many of these "green" Member States have introduced high energy

1 The 2020 target is to achieve 20% of overall EU energy production from RES.
2 The EU 2020 targets were set out in a Commission Communication of 19 October 2006 entitled "Action Plan for Energy Efficiency: Realising the Potential", which was endorsed by the European Council (in March 2007) and by the European Parliament (in its resolution of 31 January 2008).

taxes – some of which are based on the Energy Taxation Directive ("ETD").[3] This has left them with the problem of how to reduce the burden of these taxes on national industries which compete internationally with companies outside the EU (or in other Member States) which are not burdened with high energy taxes. Energy intensive companies include entities whose electricity consumption makes up around 60% of their production costs (for example manufacturers of aluminium, chemicals, paper, metals and ceramics), who are thus the hardest hit by such taxation. This situation was aggravated with the introduction of the ETS which put an EU price on carbon, further increasing the energy cost burden, particularly on energy intensive companies. These steep increases in energy costs put energy intensive industries at risk of being unable to continue to operate in an economically viable manner. In order to deal with this problem, many Member States have tax relief schemes in place to reduce the tax burden for energy intensive companies. Such tax reliefs amount to State aid because the State foregoes revenues which it would have otherwise collected and only specific companies receive the tax relief.[4]

(ii) Electricity charges

Separately from these energy charges, Member States have granted extensive State aid for RES projects in order to ensure the achievement of their EU RES targets, because energy from RES is more costly to produce than energy produced from conventional sources.[5] Given that this aid is financed by electricity customers, including those who are companies in electricity intensive industries, consumer electricity bills have risen sharply. Therefore, to mitigate these effects, some Member States (Germany being a key example) have also introduced derogations from the various RES surcharges to energy intensive industry. As will be discussed below, the Commission has recently classified such electricity charge reductions as State aid and has initiated proceedings against the German authorities.

(iii) Carbon leakage

In summary, energy intensive companies burdened with the costs of national carbon taxes, the ETS and RES charges have extremely high operating costs while having to remain internationally competitive in order to withstand competition from companies located in countries which do not impose such climate costs on their industries. The exemptions and discounts from such taxes and charges are based on the fear that these companies would "delocalise" to other countries with more lax environmental protection policies and hence lower environmental taxes and charges, triggering a so-called "carbon leakage".[6]

The art is striking the right balance between enforcing a strict State aid policy under which derogations from energy taxes and charges are strictly limited, in order to maintain the incentive to protect the environment, while ensuring that EU industries which compete at a global level remain competitive vis-à-vis companies originating in China, the US or the Middle East which allow companies to operate with no or very low costs relating to environmental protection.

III. Aid approval under the General Block Exemption Regulation

There are several options for approving aid in the form of reductions from energy taxes and charges. The first option, approval based directly on Article 107(3)(c) TFEU, is rarely used because

3 Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended. The ETD set the basis for an EU level harmonised minimum taxation level for electricity and energy products (such as motor and heating fuels).

4 In order for a measure to constitute State aid under the EU State aid rules, the following criteria under Article 107(1) TFEU must be fulfilled: (i) there must be aid in the form of an "economic advantage", (ii) the aid must be granted directly or indirectly through State resources and must be imputable to the State, (iii) the measure must favour certain undertakings or the production of certain goods, and (iv) the measure must be liable to distort competition and affect trade between Member States.

5 Renewable energy plants remain costly to build and to operate compared to conventional energy plants, mainly because the additional costs of producing green energy cannot be recuperated through the income generated from sales of green energy. The sales price of electricity remains the same, regardless of whether it comes from "green" or "conventional" sources and prices can therefore not be adjusted upwards to cover higher costs.
From the Commission's perspective, State aid for renewable energy projects can be justified by reference to the EU's environmental protection policy. It is on that basis that Member States have been consistently introducing aid support schemes, mostly in the form of feed-in tariffs and incentives to roll-out RES. Indeed, the EEAG attempt to begin the process of gradually introducing market based mechanisms for some forms of RES and to integrate them into the market.

6 There are various references to criteria for determining the risk of carbon leakage. One example of criteria for determining this risk is found in the consolidated version of the ETS Directive, Articles 10.a (15)-(16), which refers to additional direct/indirect costs imposed by the implementation of the ETS leading to a substantial increase in production costs (of at least 5% of the gross value added) and the intensity of trade with third countries (at least 10%).

the Commission has adopted several measures specifically implementing Article 107(3)(c) in order to approve this type of State aid.

The second option is the General Block Exemption Regulation ("GBER"). If the aid does not meet the criteria for approval under the GBER, the third option is to seek approval under the EEAG.

Under the GBER, Member States can introduce aid schemes which grant derogations from environmental taxes and charges provided certain conditions are met.[7] The GBER provide, as other block exemption regulations do, a method of quickly approving certain types of derogation which are unlikely to have serious anti-competitive effects. While approving a scheme under GBER allows a Member State to avoid the laborious formal notification process and subsequent assessment under the EEAG, the amount and form of aid that can be granted under this form of approval is limited.

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If the aid does not relate to a tax in the ETD, then it cannot be exempted under the GBER. Given that several significant energy products are not included in the ETD (*i.e.*, the taxes in relation to them are not harmonised, or are harmonised but result in beneficiaries paying below the minimum level of tax as required in the ETD), this means that several energy products fall outside the scope of the GBER and must be approved under the EEAG.

IV. Aid approval under the EEAG

In order to benefit from the EEAG, measures must be notified and approved by the Commission. Under the EEAG, aid is permitted in the form of (i) derogations from environmental taxes and (ii) reductions in electricity charges which fund the production of RES.

As regards taxes, a distinction is drawn between "harmonised" and "non-harmonised" taxes. The former refers to taxes having been "harmonised" by being the subject of a Community Directive or Regulation, including the ETD. If the tax has not been the subject of secondary EU law or if the conditions regarding the level of taxation set forth in the relevant legislation are not respected, it is considered to be a "non-harmonised" tax.

Derogations relating to "non-harmonised" taxes will be approved under the EEAG, provided the relevant aid measure fulfils the conditions of *necessity* and the *proportionality*.[8]

A. Necessity

In order for the aid to be *necessary*, it must also be shown that (i) without the derogation, the tax will result in a substantial increase in production costs (the "Production Costs" criteria), and (ii) that this increase cannot be included in sales prices and passed on to customers without the loss of many customers (the "Pass On" criteria).[9]

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7 See Article 44 of the General Block Exemption Regulation, C(2014) 3292/2 final.

8 According to the EEAG, the Commission will consider the aid to be necessary if the following cumulative conditions are met:
i. the choice of beneficiaries is based on objective and transparent criteria, and the aid is granted in principle in the same way for all competitors in the same sector if they are in a similar factual situation;
ii. the environmental tax without the reduction leads to a substantial increase in production costs calculated as a proportion of the gross value added for each sector or category of individual beneficiaries; and
iii. the substantial increase in production costs could not be passed on to customers without leading to significant sales reductions. See paragraph 177 of the EEAG.
Further, the Commission will consider the aid to be proportionate, according to the EEAG, if *one* of the following conditions is met:
i. The aid beneficiaries pay at least 20% of the national environmental tax; or
ii. The tax reduction is conditional on the conclusion of agreements between the Member State and the beneficiaries or associations of beneficiaries whereby the beneficiaries or associations of beneficiaries commit themselves to achieve environmental protection objectives which have the same effect as if beneficiaries pay at least 20 % of the national tax or, in the circumstances foreseen in paragraph (173), if the Union minimum tax level were applied. Such agreements or commitments may relate, among other things, to a reduction in energy consumption, a reduction in emissions, or any other environmental measure.
Such agreements must satisfy the following cumulative conditions:
a. the substance of the agreements is negotiated by the Member State, specifies the targets and fixes a time schedule for reaching the targets;
b. the Member State ensures independent and timely monitoring of the commitments concluded in the agreements; and
c. the agreements are revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met. See paragraph 178 of the EEAG.

9 These are the UK and German *lex specialis* which are discussed later in this article.

Initial drafts of the EEAG drew from the EU ETS, which defines a substantial increase in production costs as an increase of over 5% of the gross value added for each sector and a value of over 10% relating to the intensity of trade with non-EU countries.[10] This was later abandoned and there is no further guidance on this point in the EEAG. As regards the Pass On criteria, for any industry whose products are fixed on exchanges or through other global pricing mechanisms, such as the London Metals Exchange, demonstrating pass-on is straightforward. However, for other sectors such as cement, where there will not necessarily be a clear reduction in sales as a result of price increase, it is far more difficult to prove the pass-on effect.

B. Proportionality

If the necessity criteria are fulfilled, the Commission will approve the aid measures provided that the reduction is proportional.[11] Those benefitting from the tax reduction must pay at least 20% of the relevant tax. If that is not possible, those benefitting from the reduction must enter into agreements with the national authorities committing to achieve environmental protection objectives which produce the same effect as the payment of at least 20% of the tax. The Swedish and Norwegian authorities have successfully used this option multiple times. The agreements incentivised companies in these two countries to work across sectors in order to achieve improved environmental protection, and improved environmental protection was often achieved to a larger extent than the improvement which could have been achieved by imposing the tax itself. Interestingly, as a result of unclear political reasons, possibly related to cost, the Swedish authorities have stopped using this option.

V. *Lex specialis* – general

The EEAG contain *lex specialis* provisions for RES schemes in the UK and Germany. While the EEAG do not explicitly state that these provisions are aimed at RES schemes in the UK and Germany, it is clear that this is their intended function. The use of lex specialis provisions is not necessarily problematic per se, but given the unsettled status of whether the German RES scheme involves aid (discussed below), the EEAG are, indirectly, artificially stretching the parameters of what constitutes aid.

A. Lex specialis –the UK RES scheme

For the past 14 years, the UK has operated the Climate Change Levy scheme.[12] The Climate Change Levy scheme is a "green tax" on energy intensive industries. In order to lessen the burden of this tax on vulnerable industries, the UK grants derogations from the Climate Change Levy to such industries. These derogations constitute State aid which has been approved on several occasions.

Initially, energy generators were not subject to the Climate Change Levy. However, in order to reform the EU ETS (under which the price of carbon plummeted in 2013),[13] energy generators were subjected to the Climate Change Levy on fossil fuels used to generate electricity, via the introduction of the so-called Carbon Price Floor (which has led to the introduction of a "CPF Levy"). The CPF Levy extended the scope of the Climate Change Levy to cover energy generation. The Carbon Price Floor is designed to reduce greenhouse gas emissions from energy producers by raising the price on carbon emissions.[14]

However, given that energy generators factor in the cost of the Carbon Price Floor into their electricity prices, they pass on the costs of the CPF Levy to the final consumer. Companies in energy intensive industry are among the key consumers of electricity. As a result the energy intensive industries are subject to a double burden, given that they have to pay their "own" Climate Change Levy (albeit somewhat reduced) as well as the costs of the Carbon Price Floor passed on to them by energy producers through higher electricity prices.

In order to mitigate the effect of this "pass on", the UK granted an additional and specific reduction from the Climate Change Levy for companies in the energy intensive industry. This reduction constitutes State aid.

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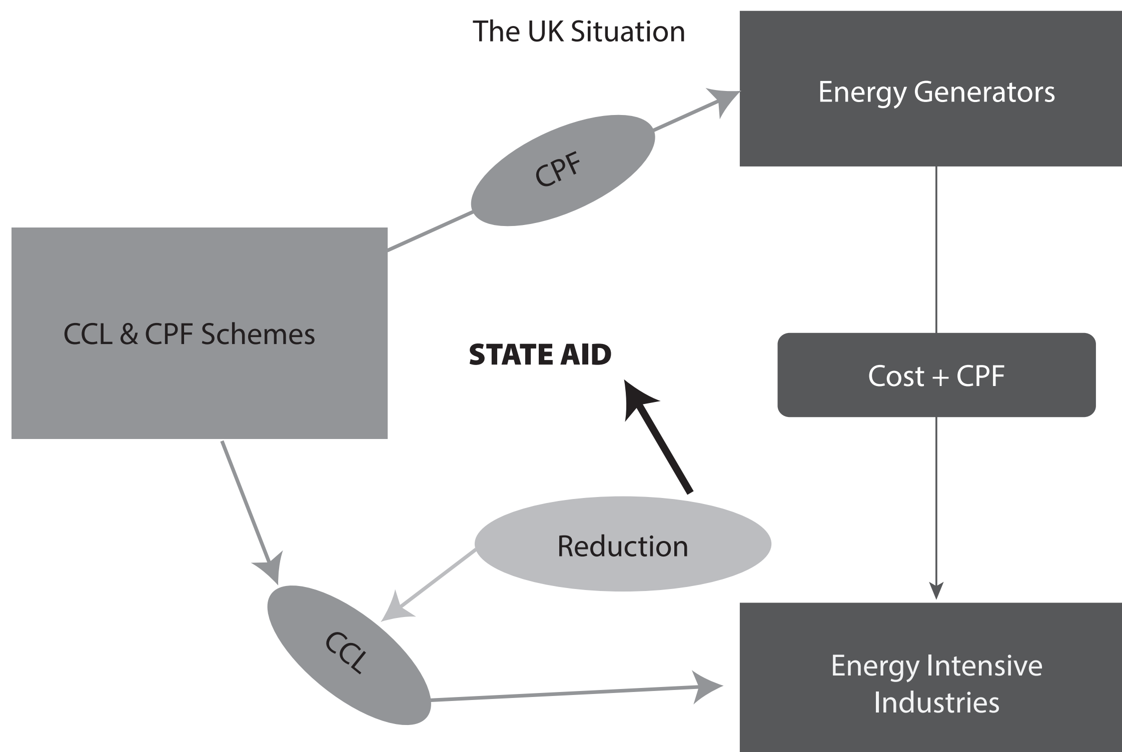
10 Intensity of trade is defined as the ratio between the total value of exports to non-EU countries plus the value of imports from non-EU countries and the total EU market size.

11 Under paragraph 178 of the EEAG

12 See UK Finance Act 2000.

13 See article of 16 April 2013, "The EU Emissions Trading Scheme has failed: "Time to scrap the ETS", available at http://www.redd-monitor.org/2013/04/16/the-eu-emissions-trading-scheme-has-failed-time-to-scrap-the-ets/

14 See article of 1 April 2013, "Carbon floor price launches at £16 per tonne", available at http://www.businessgreen.com/bg/news/2258336/carbon-floor-price-launches-at-gbp16-per-tonne.



The problem is that the derogation from the CPF Levy was granted to industry due to the "pass on" effect from energy producers which related to the Carbon Price Floor. This somewhat unorthodox rationale for reducing the tax meant that it could not be approved on the basis of the classic tax reduction provisions in the previous version of the EEAG and the current EEAG (described above).

This derogation granted to energy intensive industries could therefore only be approved through the introduction of a *lex specialis* in the EEAG. Under these new *lex specialis* provisions, the Commission can approve reductions where the carbon leakage criteria (drawn from the EU ETS) are fulfilled.[15] Approval under the UK *lex specialis* is thus limited to sectors and subsectors listed in Annex II of the ETS State Aid Guidelines (which in turn, matches those in the EU ETS Directive). The rationale for including this as a condition was that the UK's scheme is closely related to the ETS. This UK *lex specialis* is of extraordinary importance given that it ensures that UK national industries can remain internationally competitive, despite the UK increasing the carbon price for its energy producers. However, several key British energy intensive sectors are excluded, and this points to another inconsistency at the coalface between EU energy taxation, State aid and EU energy policy.[16]

B. *Lex Specialis - the German RES scheme*

A renewable energy law (the "1998 Act") was introduced in Germany in 1998, which came into effect in 2000.[17] Under the 1998 Act, an obligation was imposed on both Transmission System Operators ("TSOs") and Distribution System Operations ("DSOs") to purchase electricity from

15 See paragraph 180(a)-(c) of the EEAG. The criteria are: (a) aid is only granted to sectors and subsectors listed in Annex II of the ETS State Aid Guidelines, to compensate for additional indirect cost resulting from the tax; (b) the aid intensity and maximum aid intensities are calculated as defined in paragraphs 27 to 30 of the ETS State Aid Guidelines; and (c) aid is granted as a lump sum that can be paid to the beneficiary in

16 M. Michael Fallon, UK Minister of State for Business and Energy, along with M. Philippe Martin, French Minister of Ecology, Sustainable Development and Energy, M. Sigmar Gabriel, German Vice Chancellor and Federal Minister of Economic and Energy, and M. Federica Guidi, Italian Minister of Economic Development, had expressed their concerns in an undated letter: "*DG Competition's draft guidelines on environmental and energy aid put member states' plans to implement ambitious climate and energy policies and European industry at risk…We are concerned that the current draft of the guidelines risks constraining the ability of Member States to determine their national energy policy… The criteria for exemptions for electricity-intensive industries in the draft guidelines would leave sectors and undertakings exposed to international competition at risk of carbon leakage. The European Commission must work with member States to ensure the guidelines are effectively targeted at those industries which are most at risk*". See also *Financial Times* article April 21, 2014, 'EU blow to UK energy-intensive companies'.

17 See *Gesetz zur Neuregelung des Energiewirtschaftsrechts* (BGBl. 1988 I, Nr. 23, Seite 730) **(the "1998 Act")**. Interestingly, this same Act was also the focus of *PreussenElektra*.

RES operators at above the market price.

The extra costs could be charged to the customer.[18] In 2001, the European Court of Justice found in its *PreussenElektra*[19] ruling that this mechanism did not constitute State aid. The Court did not consider the TSO to be a prolonged arm of the State[20] and its obligation to purchase electricity from RES operators at prices above the market price in the 1998 Act did not involve State aid.

In 2012, the provisions of the 1998 Act were extended via the *Erneuerbare-Energien-Gesetz* ("the EEG Act"), which is based on the provisions which were initially established in the 1998 Act.[21] The aim of the EEG Act was to enable Germany to achieve its target of generating at least 50% of its gross electrical generation from RES by 2030.

As previously, the costs of funding RES can be charged to electricity customers. However, this time it was in the form of a "surcharge". The proceeds of this surcharge are given to RES producers in order to encourage RES production and the surcharge is managed by four German TSOs.

Given that the surcharge is based on electricity consumption, it is very expensive for energy intensive businesses. Thus, Germany also introduced various derogations from the EEG Act, which meant that certain (energy intensive) customers did not have to pay the full surcharge (by preventing the TSOs from passing on the surcharge in full to those customers).

In 2012, the Commission opened the formal State aid investigation procedure on the EEG Act (the "*EEG Decision*").[22] The Commission investigation found that the following two measures under the EEG Act 2012 involved State aid[23]:

(a) Advantage for the producers of RES electricity. The RES producers received a higher price for RES than the market price.

(b) Advantage to energy intensive industries in the manufacturing sector. Energy intensive industries did not have to pay the full surcharge because there was a cap on the level of the EEG surcharge which could be obtained from them, placing them at an advantage compared to other companies which had to pay the full surcharge.

Thus despite the fact that the Court of Justice had found that the 1998 Act did not involve State aid in *PreussenElektra*, the Commission held that the EEG Act *"now contains an important number of features that were not present in the 2000 scheme"*.[24]

In its decision to open the formal investigation procedure on the EEG, the Commission found that the TSO in this case was an intermediary which was subject to State control. This meant that the obligation on TSOs to purchase RES at a fixed price above market prices involved State aid. In line with this, a derogation granted to energy intensive customers to be exempt from financing the RES was also considered to involve State aid.

The Commission's findings that the TSOs were intermediaries, and thus that State resources were involved, were based on the following main reasons: (i) the TSOs were not free to establish the level of the surcharge; (ii) the EEG Act placed numerous obligations on the TSOs to equalize and manage the surcharge under the EEG Act; and (iii) the extension of the *Bundesnetzagentur's* monitoring role clearly indicated the existence of State influence and control over the financing of the RES in the TSO.

The qualification of the TSOs as intermediaries

18 The law states that the costs *"may be imputed to distribution or transmission and taken into account when determining compensation for transit".*

19 Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

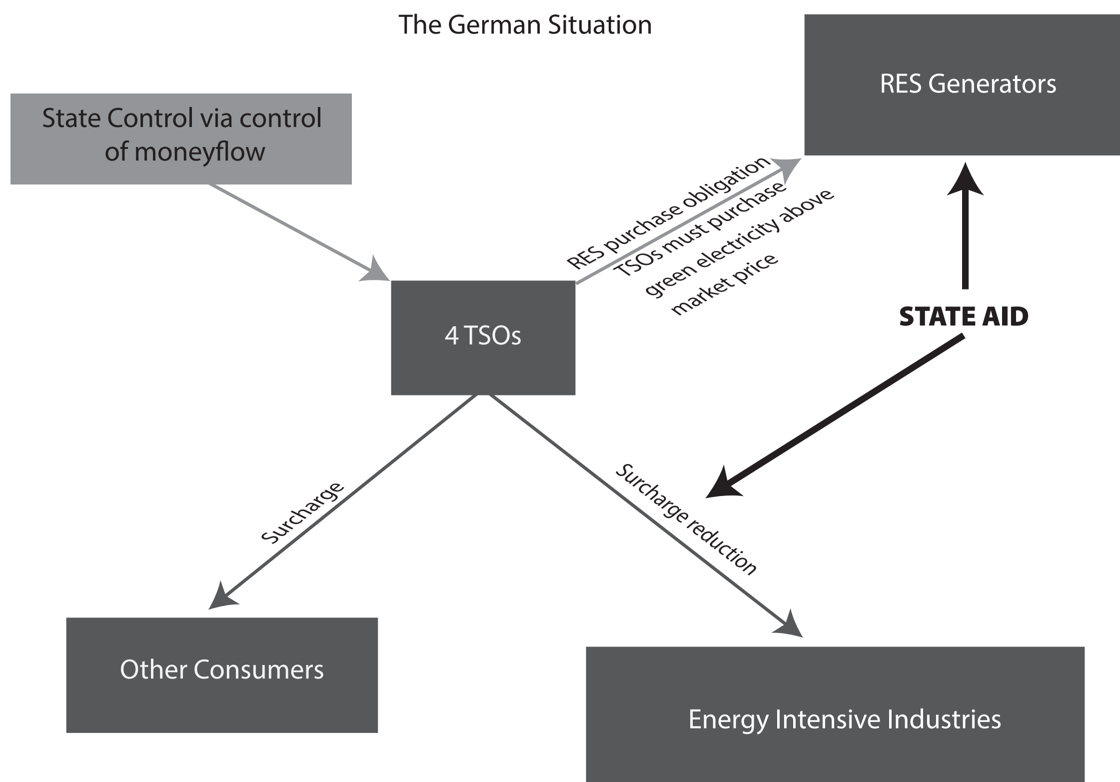
20 *i.e.*, an "intermediary". An "intermediary" under State aid law is a State-controlled entity which collects financing and distributes it to aid beneficiaries. An entity deemed to be an "intermediary" can be public or private, as long as it is held to be controlled by the State.

21 See *Gesetz für den Vorrang Erneurbarer Energien (Erneuerbare-Energien-Gesetz-EEG) as amended by the Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneurerbaren Energien* (BGBl. 2011 I, Nr. 42, Seite 1634) **(the "EEG Act")**.

22 State Aid SA.33995 (2013/C) (ex 2013/NN) – Germany – Support for renewable electricity and related EEG-surcharge for energy-intensive users **("EEG Decision")**.

23 In addition, the Commission found that a third measure, a reduction on the surcharge granted to suppliers sourcing 50% of its electricity portfolio from domestic RES constituted aid measures (2008/C 82/01). Further discussion of this measure is beyond the scope of this article.

24 At paragraph 150. See also IP/13/1283 Commission Press Release, Brussels, 18 December 2013: *"State aid: Commission opens in-depth inquiry into support for energy-intensive companies benefitting from a reduced renewables surcharge"*: The Commission's press release stated: *"In 2012, the EEG-Act was substantially amended. The amendments have changed the structure of the German support mechanism to electricity from renewable sources in such a way that it constitutes aid within the meaning of the EU rules, because it is financed by a resource under the control of the state. The EEG-Act 2012 provides for a surcharge to be imposed on the consumption of electricity. The surcharge is to be managed by the four Germany transmission system operators according to detailed rules established in the EEG-Act 2012 and implementing regulations. The regulator is in charge of the monitoring of the management of the surcharge. By contrast, the previous system introduced in 1998 was based on a purchase obligation and was found by the Court of Justice not to constitute state aid (Case V-379/98 PreussenElektra)".* Emphasis added.



under the 2012 EEG Act in the *EEG Decision* marks a paradigm shift, exposing present and future Member State RES schemes on energy tax derogations for energy intensive companies to more detailed scrutiny in the future, including exposing beneficiaries to a potential risk of repayment of the aid.[25] This expansion of the notion of "aid" for the purposes of the State aid rules has far reaching consequences for Member States, given that each Member State has at least one TSO exercising various regulatory functions which also risk falling under State aid rules based on the *EEG Decision*. The case thus has potential ramifications for the future development of not only German, but also EU and other Member States' support systems for the shift to renewable energy.

VI. An unprincipled extension of the notion of aid

The application of the State aid rules in the *EEG Decision* has been heavily criticized. It is a general principle of EU State aid law that in order to be subject to the State aid rules, an aid measure must involve State aid resources (*i.e.*, the State either grants funding or foregoes revenues). However, under the scenario in the *EEG Decision*, as in *PreussenElektra*, no money passed through the State, as the RES financing was funded entirely through private resources and the TSO does not qualify as a State controlled body which functioning as a prolonged arm of the State.

It is arguable that the facts of the two cases, *Preussen Elektra* and the *EEG Decision*, were the same:

(i) in both cases, a TSO was subject to the purchase obligation;

(ii) in both cases, the schemes were funded by final customers[26];

(iii) in both cases, the TSO had not been specifically established for the purposes of collecting the surcharge (as had been the situation in other cases to date on the intermediary doctrine); and

25 If the Commission adopts a negative decision in the end, the companies which benefitted from exemptions under the 2012 EEG might have to pay back these "exemptions" which have already been granted. Germany has now reached an agreement with the Commission to amend the EEG 2012 to ensure that it is compatible with the State aid rules. As part of this agreement, Germany agreed that around 350 German companies would pay back around 30m EUR to cover advantages obtained from exemptions which had been previously granted to German industry.

26 This fact is contrary to the Commission's assertions in the *Draft Commission Notice on the notion of aid pursuant to Article 107(1) TFEU* (the **"Notice on the Notion of Aid"**), which incorrectly asserts that in *PreussenElektra, "the private undertaking was not allowed to pass on its additional costs to its custowmers"* (at fn. 94), and uses this incorrect statement as an erroneous basis for distinguishing *PreussenElektra* from the *EEG Decision*. Both schemes under the 1998 Act and the EEG Act were ultimately funded by the final consumer.

(iv) in both cases the additional costs of RES could be collected from customers.

If the facts of the two cases were the same, then arguably, the Commission should not have stretched the intermediary doctrine to cover TSOs in the *EEG Decision*.

The reasoning used by the Commission to reach the conclusion that it was not bound by the *PreussenElektra* ruling is interesting. Its reasoning hinges on whether the TSOs (or the electricity suppliers) were prevented from collecting the costs of financing RES from customers. In fact, the Commission considers that in *PreussenElektra*, the TSOs (or the electricity suppliers) were prevented from charging the additional RES costs to customers.[27]

The Commission argued that *PreussenElektra* differed because the 1998 Act was *"limited at (sic) directly obliging electricity supply undertakings and [TSOs and DSOs] to purchase renewable electricity at a fixed price"* and that *"[t]here was no surcharge established by the State to compensate the electricity suppliers for the financial burden resulting from the supply obligation"*[28]. The Commission concluded that *"contrary to what was the situation (sic) in the PreussenElektra case, the undertakings on which the purchase obligation rests has been provided by the State with a surcharge that provides them with the required financial resources to finance the support to RES electricity"*.[29]

However, as already discussed above, under the 1998 Act suppliers were able (but not obliged) to pass on the surcharge to final consumers. The Commission does not provide any evidence in its *EEG Decision* that this was *de facto* not the case. In addition, with regard to the 2012 EEG Act, the Commission acknowledged that suppliers are free (but not obliged) to pass on costs to the final consumer.[30] Thus, suppliers were able to collect the additional costs of RES from customers under the 1998 Act and remain able to do so under the EEG Act.

The Commission also based its reasoning on the *Essent*[31] case, which found that a company designated by the State was an intermediary. However, in *Essent*, the company in question had been specifically designated in order to collect the surcharge in question. This was not the case in the *EEG Decision*.

In response to the Commission's decision, over 30 appeals from more than 70 companies have been lodged at the EU Courts challenging the Commission decision. These appeals should expose the gaps in the Commission's reasoning in the *EEG Decision*.[32] In addition, it should also provide a much needed opportunity for the Court to clearly define the scope of the intermediary doctrine and thus provide welcome legal certainty to this grey area.

VII. Concluding remarks

In conclusion, while the Commission has created *lex specialis* provisions in the EEAG for the UK and Germany, this potentially leaves other Member States, particularly those with similarly complex RES schemes, such as France and Spain, in a difficult situation. As the *lex specialis* provisions are specifically aimed at the UK and Germany, it is far from certain that other Member States, with their own specific national schemes, legal systems, processes and regulations, will be in a position to rely on these provisions specifically designed for the UK and Germany, in order for their RES to be approved.

These potential difficulties are exacerbated by the lack of clarity in relation to the intermediary doctrine following the Commission's *EEG Decision*. Further difficulties are raised by the risk that the Commission may codify this arguably unprincipled extension of the intermediary doctrine, in the final version of its draft Notice on the Notion of Aid, given that this extension has already found its way into the draft version of this Notice.

27 *Ibid*. This is apparent from the Commission's *Notice on the Notion of Aid*, at footnote 94.

28 See *EEG Decision*, at paragraph 93.

29 See *EEG Decision*, paragraph 103.

30 See *EEG Decision*, at paragraph 22: "The EEG-Act does not impose on electricity supplies the obligation to pass on the EEG-surcharge to customers".

31 Case C-206/06 *Essent* [2008] ECR I-5497. Dutch legislation imposed a surcharge on electricity consumers to cover stranded costs, incurred by obligations or investments in the context of the liberalisation of the electricity market, and designated a company (a joint subsidiary of the generating undertakings) to collect the surcharge. Customers paid the surcharge to their net operators which then transferred the surcharges to the designated company. The Court held that the objective of the Dutch legislation was to enable the electricity generating undertakings, through their joint subsidiary SEP which was designated to collect the surcharges, to recover the non-market-compatible costs which they incurred in the past.

32 See e.g., Case T-172/14 *Stahlwerk Bous v Commission;* Case T-230/14 *Deutsche Edelstahlwerke v Commission*; T-236/14 *Kronotex and Kronoply v Commission;* T-265/14 *Schumacher Packaging v Commission;* T-260/14 *Vattenfall Europe Mining and Others v Commission;* T-237/14 *Steinbeis Papier v Commission;* and T-263/14 *Hydro Aluminium Rolled Products and Others v Commission.*